

REPUBLIC OF SOUTH AFRICA

TRADITIONAL COURTS BILL

(As introduced in the National Council of Provinces (proposed section 76), on request of the Minister of Justice and Constitutional Development; explanatory summary of Bill published in Government Gazette No. 34850 of 13 December 2011) (Bill originally introduced in National Assembly as Traditional Courts Bill [B 15—2008], and withdrawn on 2 June 2011)
(The English text is the official text of the Bill)

(SELECT COMMITTEE ON SECURITY AND CONSTITUTIONAL DEVELOPMENT)

[B 1—2012]

ISBN 978-1-77037-921-3

No. of copies printed 1 800

BILL

To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith.

PREAMBLE

SINCE the Constitution recognises the institution, status and role of traditional leadership, including a role in the administration of justice, as well as the application of customary law, subject to the Constitution;

AND SINCE the traditional justice system, which is based on customary law, forms part of the legal system of the Republic;

AND SINCE the Traditional Leadership and Governance Framework Act, 2003, recognises a role for the institution of traditional leadership in the administration of justice;

AND SINCE it is necessary to transform the traditional justice system, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;

AND SINCE it is necessary to have a single statute applicable throughout the Republic, regulating traditional courts,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Definitions

1. In this Act, unless the context indicates otherwise—
 - “**Black Administration Act**” means the Black Administration Act, 1927 (Act No. 38 of 1927); 15
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
 - “**Department**” means the Department of Justice and Constitutional Development;
 - “**Director-General**” means the Director-General of the Department;
 - “**headman or headwoman**” means a headman or headwoman contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a headman or headwoman, as is contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act; 20
 - “**king or queen**” means a king or queen contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a king or queen, as contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act; 25
 - “**Minister**” means the Cabinet member responsible for the administration of justice; 30
 - “**prescribed**” means prescribed by regulation;
 - “**presiding officer**” means a king, queen, senior traditional leader, headman, headwoman or member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4 and who — 35
 - (a) presides over proceedings in the resolution of disputes contemplated in this Act; or
 - (b) pronounces judgment at the end of such proceedings after being advised in terms of customary law and custom; 40
 - “**regulation**” means a regulation in terms of section 21;
 - “**Repeal of the Black Administration Act and Amendment of Certain Laws Act**” means the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (Act No. 28 of 2005);
 - “**royal family**” means royal family as defined in the Traditional Leadership and Governance Framework Act; 45
 - “**senior traditional leader**” means a senior traditional leader contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a senior traditional leader, as is contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act; 50
 - “**this Act**” includes any regulation;
 - “**traditional community**” means a traditional community recognised as such in terms of section 2 of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act; 55
 - “**traditional council**” means a traditional council which has been recognised and established under section 3 of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act; 60

- “traditional court”** means a court established as part of the traditional justice system, which—
- (a) functions in terms of customary law and custom; and
 - (b) is presided over by a king, queen, senior traditional leader, headman, headwoman or a member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4, and which includes a forum of community elders who meet to resolve any dispute which has arisen, referred to in the different languages as—
 - (i) “*eBandla*” in isiNdebele
 - (ii) “*Huvo*” in Xitsonga;
 - (iii) “*inKantolo yeNdabuko*” in isiZulu;
 - (iv) “*iNkhundla*” in siSwati;
 - (v) “*iNkundla*” in isiXhosa;
 - (vi) “*Kgoro*” in Sepedi;
 - (vii) “*Kgotla*” in Sesotho;
 - (viii) “*Khoro*” in Tshivenda;
 - (ix) “*Lekgotla*” in Setswana; and
 - (x) “*Tradisionele hof*” in Afrikaans.
- “traditional justice system”** means a system of law which is based on customary law and customs;
- “traditional leader”** means a person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Traditional Leadership and Governance Framework Act;
- “Traditional Leadership and Governance Framework Act”** means the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

Objects of Act

2. The objects of this Act are to—
- (a) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
 - (b) affirm the role of the institution of traditional leadership in —
 - (i) promoting social cohesion, co-existence and peace and harmony in traditional communities;
 - (ii) enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes; and
 - (iii) promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values;
 - (c) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and
 - (d) enhance the effectiveness, efficiency and integrity of the traditional justice system.

Guiding principles

3. (1) In the application of this Act, the following principles should apply:
- (a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution, including—
 - (i) the right to human dignity;
 - (ii) the achievement of equality and the advancement of human rights and freedoms; and
 - (iii) non-racialism and non-sexism;
 - (b) the need to promote access to justice for all persons;
 - (c) the promotion of restorative justice measures;
 - (d) the enhancement of the quality of life of traditional communities through mediation;
 - (e) the development of skills and capacity for persons applying this Act in order to ensure the effective implementation thereof; and
 - (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.

- (2) In the application of this Act, the following should be recognised and taken into account:
- (a) The constitutional imperative that courts, tribunals or forums, when—
 - (i) interpreting the Bill of Rights, must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom; and
 - (ii) interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights;
 - (b) the existence of systemic unfair discrimination and inequalities, particularly in respect of gender, age, race, as a result of past unfair discrimination, brought about by colonialism, apartheid and patriarchy;
 - (c) the need to promote and preserve the African values of justice which promote social cohesion, reconciliation and restorative justice; and
 - (d) the principles underlying the traditional justice system are not, in all respects, the same as in the context of due process, as applied or understood in the retributive justice system.

Designation and training of traditional leaders

4. (1) The Minister may, in the prescribed manner, after consultation with the Premier of the province in question, designate a senior traditional leader recognised as such by the Premier, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area of jurisdiction in respect of which such senior traditional leader has jurisdiction.

(2) The Minister may, in the prescribed manner, after consultation with the President, designate a king or queen recognised as such by the President, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area or areas of jurisdiction in respect of which such king or queen has jurisdiction.

(3) Any designation made by the Minister in terms of subsection (1) or (2) is effective from the date of the recognition of the traditional leader as king, queen or senior traditional leader, by the Premier or President, as the case may be, as contemplated in the Traditional Leadership and Governance Framework Act.

(4) The Minister may, at the written request of a king, queen or senior traditional leader contemplated in subsection (1) or (2), in the prescribed manner, designate any headman, headwoman or a member of the royal family as an alternative presiding officer of the traditional court, in the absence of such king, queen or senior traditional leader.

(5) Any king, queen, senior traditional leader, headman, headwoman or member of the royal family who has been designated in terms of subsection (1), (2) or (4) must—

- (a) save where such king, queen, senior traditional leader, headman, headwoman or member of the royal family is exempted from attending a prescribed training programme or course in the circumstances prescribed in section 21(1)(c); and
- (b) subject to section 23(3)(a)(i) or 23(3)(b)(i),

as soon as is practicable after he or she has been so designated, but within a period of at least 12 months after such designation, attend the prescribed training programme or course contemplated in section 21(1)(b).

(6) The Minister may, in the prescribed manner, revoke any designation made under subsection (1), (2) or (4) if the designated king, queen, senior traditional leader, headman, headwoman or member of the royal family fails to attend the prescribed training programme or course within the period contemplated in subsection (5) and such failure is due to the fault on the part of such person.

(7) The Director-General must establish and keep a prescribed register of all kings, queens, senior traditional leaders, headmen, headwomen and members of the royal family who have been designated in terms of subsection (1), (2) or (4) or whose designation has been suspended or revoked in terms of subsection (6) or section 16.

(8) The Director-General must establish and keep a prescribed register of all traditional leaders who have completed the prescribed training programme or course as contemplated in section 21(1)(f).

Settlement of certain civil disputes of a customary law nature by traditional courts

5. (1) A traditional court may, subject to subsection (2), hear and determine civil disputes arising out of customary law and custom brought before the court where the act or omission which gave rise to the civil dispute occurred within the area of jurisdiction of the traditional court in question. 5

(2) A traditional court may not under this section or any other law hear and determine—

- (a) any constitutional matter;
- (b) any question of nullity, divorce or separation arising out of a marriage, whether a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), a customary marriage under the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or a civil union under the Civil Union Act, 2006 (Act No. 17 of 2006); 10
- (c) any matter relating to the custody and guardianship of minor children;
- (d) any matter relating to the validity, effect or interpretation of a will; 15
- (e) any matter arising out of customary law and custom where the claim or the value of the property in dispute exceeds the amount determined by the Minister from time to time by notice in the *Gazette*; or
- (f) any matter arising out of customary law and custom relating to any category of property determined by the Minister from time to time by notice in the *Gazette*. 20

Settlement of certain criminal disputes by traditional court

6. A traditional court may, subject to section 10(1), hear and determine offences brought before the court if the offence occurred within the area of jurisdiction of the traditional court in question and if such offence is listed in the Schedule. 25

Nature of traditional courts

7. Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to—

- (a) prevent conflict; 30
- (b) maintain harmony; and
- (c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

Sessions of traditional court 35

8. Sessions of a traditional court are held at the time and place determined by the presiding officer of the traditional court, in accordance with customary law and customary practices.

Procedure of traditional court

9. (1) Subject to subsection (2)— 40

- (a) the procedure at any proceedings of a traditional court; and
 - (b) the manner of execution of any sanction imposed by a traditional court,
- must be in accordance with customary law and custom, except in so far as the Minister prescribes otherwise under section 21(2)(a).

(2) During proceedings of a traditional court, a presiding officer must ensure that— 45

- (a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:
 - (i) That women are afforded full and equal participation in the proceedings, as men are; and
 - (ii) that vulnerable persons, particularly children, disabled persons and the elderly, are treated in a manner that takes into account their particular vulnerability; and 50

- (b) the following rules of natural justice are adhered to:
 - (i) The *audi alteram partem* rule, which means that persons affected by a decision must be given a fair hearing by the decision-maker before the decision is made; and
 - (ii) the *nemo iudex in propria causa* rule, which means that any decision-making must be, and must be reasonably perceived to be, impartial. 5
- (3) (a) No party to any proceedings before a traditional court may be represented by a legal representative.
- (b) A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom. 10
- (4) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the court must apply the system of customary law that the parties expressly agreed should apply.
- (b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines: 15
 - (i) The system of customary law applicable in the area of jurisdiction of the traditional court should take precedence over any other system of customary law; or
 - (ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection. 20
- (5) (a) The traditional court must, in the prescribed manner—
 - (i) issue a receipt to every person in respect of any fine paid by such person;
 - (ii) pay any fine collected in terms of subparagraph (i) into the provincial revenue fund of the province in question; and 25
 - (iii) cause records to be kept of all financial transactions relating to any money paid into the provincial revenue fund as fines, in terms of subparagraph (ii).
- (b) The records and financial transactions of every traditional court relating to fines must be audited when the financial statements of traditional councils are audited, as contemplated in section 4(2)(b) of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by that Act. 30

Sanctions and orders that may be given by traditional court

- 10. (1) In the case of a criminal dispute, a traditional court may not impose the following sanctions:
 - (a) Any punishment which is inhumane, cruel or degrading, or which involves any form of detention, including imprisonment; 35
 - (b) banishment from the traditional community;
 - (c) a fine in excess of the amount determined by the Minister from time to time by notice in the *Gazette*; and
 - (d) corporal punishment. 40
- (2) A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, make any appropriate order in the circumstances, including the following:
 - (a) An order for the payment of a fine, sounding in money, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, payable in instalments, if necessary; 45
 - (b) an order, expressed in monetary terms or otherwise, including livestock—
 - (i) making a settlement between the parties to the proceedings an order of court;
 - (ii) for the payment of any damages in respect of any proven financial loss; 50
 - (iii) for the payment of compensation to a party; or
 - (iv) for the payment of damages to an appropriate body or organisation;
 - (c) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;
 - (d) an order that an unconditional apology be made; 55
 - (e) an order requiring the accused person or defendant to make regular progress reports to the court regarding compliance with any condition imposed by the court;
 - (f) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; 60

- (g) an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court;
- (h) an order that one of the parties to the dispute, both parties or any other person performs some form of service for or provides some benefit to, a specified victim or victims; 5
- (i) an order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom;
- (j) an order discharging a person with a caution or reprimand in the case of a criminal dispute; 10
- (k) an order, containing a combination of any of the sanctions contemplated in paragraphs (a) to (j), except where the matter is referred to the national prosecuting authority under paragraph (f), in which event the decision of the national prosecuting authority will prevail; and 15
- (l) any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act.

Enforcement of sanctions of traditional courts

11. (1) If it comes to the attention of a traditional court that a person upon whom the traditional court has imposed a sanction, has not complied with the sanction in question, including the payment of a fine, sum of money or livestock, in whole or in part, that traditional court must, in the prescribed manner, cause such person to appear before it. 20

(2) (a) When a person appears before a traditional court as contemplated in subsection (1), the traditional court must inquire into the reasons for the person’s failure to comply with the sanction imposed by the traditional court and make a determination as to whether the failure is due to fault on the part of the person or not. 25

(b) If it is found that the failure is not due to fault on the part of the person, the traditional court may make an appropriate order which will assist the person to comply with the sanction initially imposed.

(c) If it is found that the failure is due to fault on the part of the person, the traditional court may deal with the matter in accordance with customary law and custom and may impose further sanctions for such non-compliance. 30

(d) Any order made by a traditional court as contemplated in paragraph (c) in the form of the payment of a fine, as contemplated in section 10(2)(a), or in the form of compensation to a person, as contemplated in section 10(2)(b), has the effect of a civil judgment of the magistrate’s court having jurisdiction and is enforceable by execution in that magistrate’s court, in accordance with the provisions of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and as may be prescribed, and the person to whom such compensation is payable may proceed as if the order was made in the magistrate’s court in his or her favour. 35 40

Order of traditional court final

12. An order of a traditional court is final, except where a party to the proceedings exercises his or her rights as contemplated in section 13 in respect of appeals or section 14 in respect of procedural review.

Appeals to magistrates’ courts 45

13. (1) A party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate’s court having jurisdiction against an order of a traditional court, as contemplated in section 10(2)(a), (b), (h) or (i), as well as section 10(2)(k), to the extent that the order in terms of section 10(2)(k) relates to an order contemplated in section 10(2)(a), (b), (h) or (i). 50

(2) An order of a traditional court in respect of which an appeal is lodged, as contemplated in subsection (1), is suspended until the appeal has been decided (if it was prosecuted in the time and in the manner so prescribed) or until the expiry of the prescribed period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed. 55

(3) Notwithstanding any other law to the contrary, a magistrate’s court hearing an appeal as contemplated in this section has the power to —

- (a) confirm the order of the traditional court;
- (b) amend or substitute the order of the traditional court, as it deems appropriate in the circumstances, with any order contemplated in section 10(2); or
- (c) dismiss the order of the traditional court.

Procedural review by magistrates' courts 5

14. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take such proceedings on review before a magistrate's court in whose area of jurisdiction the traditional court sits on any of the following grounds:

- (a) The traditional court acted *ultra vires* (outside the scope of the Act);
- (b) absence of jurisdiction on the part of the traditional court; 10
- (c) gross irregularity with regard to the proceedings; or
- (d) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004), on the part of the presiding officer. 15

(2) Notwithstanding any other law to the contrary, a magistrate's court has the powers, as may be prescribed, relating to a procedural review contemplated in this section.

Oath or affirmation of office

15. (1) A traditional leader who has been designated as presiding officer of a traditional court must, subject to section 23(3)(a)(ii) or 23(3)(b)(ii), take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate of the magistrate's court having jurisdiction or any additional magistrate of that court who has been authorised thereto in writing by the said magistrate, before he or she may perform any of the functions contemplated in this Act. 20

(2) The Director-General must establish and keep a prescribed register of every traditional leader in the traditional court in question who has taken the prescribed oath or made the prescribed affirmation, as contemplated in this section or section 23(3)(a)(ii) or 23(3)(b)(ii). 25

Incapacity, gross incompetence or misconduct of presiding officers 30

16. (1) Any person may, in the prescribed manner, lodge with the Minister a complaint relating to the role of a presiding officer in the administration of justice.

(2) A complaint must be lodged by means of a prescribed affidavit or an affirmed statement, specifying—

- (a) the nature of the complaint; and 35
- (b) the facts upon which the complaint is based.

(3) The grounds on which any complaint against a presiding officer may be lodged, are the following:

- (a) (i) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer; 40
- (ii) gross incompetence; or
- (iii) misconduct,

which has a bearing on the administration of justice;

- (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, which has a bearing on the administration of justice; 45

- (c) any wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) or (b), that is incompatible with or unbecoming of, the office of presiding officer; or 50

- (d) any contravention of a provision of this Act.

(4) (a) Upon receipt of a complaint as contemplated in subsection (1), and if the Director-General or an official in the Department above the rank of Director or any official of equivalent rank, authorised thereto in writing by the Director-General, has in the prescribed manner satisfied himself or herself that the complaint falls within one of the grounds as contemplated in subsection (3), the Minister must immediately refer it to the Premier concerned for investigation by the mechanism contemplated in section 27(3)(a) of the Traditional Leadership and Governance Framework Act, established in terms of legislation applicable in the province concerned. 5

(b) The Premier must, after the investigation contemplated in paragraph (a) has been finalised, submit a report to the Minister, with any of the following recommendations: 10

- (i) That the designation of the presiding officer be revoked, together with a recommendation regarding the designation of a substitute presiding officer;
- (ii) that the designation of the presiding officer be suspended for the duration of any specific remedial measure suggested by the Premier, as contemplated in paragraph (c)(v) to (vii); 15
- (iii) that the presiding officer be subjected to any specific remedial measure suggested by the Premier, as contemplated in paragraph (c); or
- (iv) that the complaint be dismissed.

(c) Any one or a combination of the following remedial measures may be imposed on a presiding officer, if his or her designation is not revoked: 20

- (i) An apology to the complainant;
- (ii) a reprimand;
- (iii) a written warning;
- (iv) any form of compensation;
- (v) any appropriate counselling; 25
- (vi) the attendance of a specific training course; or
- (vii) any other appropriate corrective measure.

(5) Upon receipt of the report and recommendation contemplated in subsection (4), the Minister must consider the matter and, in consultation with the Premier, decide on how the matter must be dealt with. 30

(6) After a decision has been reached as contemplated in subsection (5), the Minister must immediately, in writing, inform the presiding officer and the complainant of his or her decision.

(7) A traditional leader who is removed from office in terms of the Traditional Leadership and Governance Framework Act, is deemed to have had his or her designation as a presiding officer revoked. 35

Assignment of officers to assist traditional courts

17. The Minister may, within the resources available at the magistrate’s court in which jurisdiction the traditional court sits, assign one or more officers to assist a traditional court in performing its functions under this Act. 40

Record of proceedings

18. A traditional court must, in the prescribed manner, record or cause to be recorded—

- (a) the nature of each dispute or charge;
- (b) a summary of the facts of the case; and 45
- (c) the decision of the court, including the sentence, order or sanction of the court.

Transfer of cases

19. (1) If a presiding officer of a traditional court is of the opinion that a dispute before it is not a matter in respect of which a traditional court has jurisdiction, as contemplated in section 5 in the case of civil disputes or section 6 in the case of criminal disputes, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a magistrate’s court or a small claims court, he or she may, in the prescribed manner, transfer such dispute to the magistrate’s court or small claims court having jurisdiction and notify the parties to the dispute of the transfer. 50

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her— 5

(a) in the case of a civil dispute—

(i) is a matter that can be dealt with appropriately in terms of customary law and custom in a traditional court; and

(ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in section 5; or 10

(b) in the case of a criminal dispute, is a matter in respect of which a traditional court has jurisdiction, as contemplated in section 6,

the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may, in the prescribed manner, transfer the dispute to the traditional court having jurisdiction and notify the parties to the dispute of the transfer. 15

Offences and penalties

20. Any person who—

(a) wilfully insults a presiding officer during proceedings of a traditional court; or

(b) wilfully interrupts the proceedings of a traditional court or otherwise misbehaves himself or herself in the place where the proceedings are held; or 20

(c) having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer,

is guilty of an offence and liable on conviction to a fine. 25

Regulations

21. (1) The Minister must make regulations regarding the following:

(a) The manner in which a traditional leader is designated as a presiding officer of a traditional court, as contemplated in section 4(1), (2) or (4);

(b) the training programmes or courses and the contents thereof for traditional leaders who have been designated as presiding officers, as contemplated in section 4(5); 30

(c) the circumstances in which a traditional leader may be exempted from attending a training programme or course, as contemplated in section 4(5)(a);

(d) the manner in which the designation of a traditional leader as a presiding officer of a traditional court is revoked, as contemplated in section 4(6); 35

(e) the register to be established and kept by the Director-General of all traditional leaders who have been designated as presiding officers of traditional courts or whose designations as presiding officers of traditional courts have been suspended or revoked, as contemplated in section 4(7); 40

(f) the register to be established and kept by the Director-General of all traditional leaders who have completed the training programmes or courses, as contemplated in section 4(8);

(g) the manner in which a traditional court, as contemplated in section 9(5)(a), must— 45

(i) issue receipts in respect of fines paid;

(ii) pay any fines received into the relevant provincial revenue fund; and

(iii) keep records of financial transactions relating to money paid into the relevant provincial revenue fund;

(h) the manner in which a traditional court must cause persons, who have not complied with any sanctions imposed by it, to appear before it, as contemplated in section 11(1); 50

(i) the manner and period in which an appeal must be lodged, as contemplated in section 13(1);

(j) the manner and period in which a matter may be taken on procedural review, as contemplated in section 14(1); 55

(k) the powers of a magistrate's court relating to procedural reviews, as contemplated in section 14(2);

- (l) the oath to be taken or affirmation to be made by a presiding officer of a traditional court, as contemplated in section 15(1);
 - (m) the register to be established and kept by the Director-General, containing the particulars of every traditional leader who has taken an oath or made an affirmation, as contemplated in section 15(2); 5
 - (n) the manner in which a complaint relating to the role of a presiding officer in the administration of justice must be lodged with the Minister, as contemplated in section 16(1);
 - (o) the affidavit or affirmed statement on which a complaint must be lodged with the Minister against a presiding officer, specifying the nature of the complaint against the presiding officer and the facts upon which the complaint is based, as contemplated in section 16(2); 10
 - (p) the manner in which a complaint against a presiding officer must be verified as falling within one of the grounds for initiating an investigation against a presiding officer, as contemplated in section 16(4)(a); 15
 - (q) the manner in which a traditional court must keep records, as contemplated in section 18;
 - (r) the manner in which matters may be referred from traditional courts to magistrates' courts and from magistrates' courts to traditional courts, as contemplated in section 19; or 20
 - (s) any other matter which is necessary to prescribe in order to give effect to this Act.
- (2) The Minister may make regulations regarding the following:
- (a) The procedure applicable in proceedings of a traditional court and the manner of execution of any sanction imposed by a traditional court, as contemplated in section 9(1); 25
 - (b) the manner in which an order of a traditional court must be executed in a magistrate's court, as contemplated in section 11(2)(d);
 - (c) the collation and processing of information relating to the functioning of traditional courts, which must be submitted annually by the Minister to Parliament and the National House of Traditional Leaders; or 30
 - (d) any other matter which may be prescribed in order to give effect to this Act.
- (3) Any regulation envisaged under this section must be made after consultation with the Cabinet member responsible for traditional leadership matters and the National House of Traditional Leaders. 35
- (4) Any regulation made in terms of subsection (1) or (2) may provide that any person who contravenes a provision thereof or fails to comply therewith, is guilty of an offence and, on conviction, is liable to a fine.

Delegation of powers

22. The Minister may, in writing, delegate any of the powers conferred on him or her under this Act, to the Deputy Minister responsible for the administration of justice, the Director-General or any official in the Department above the rank of Director or any official of equivalent rank. 40

Transitional provisions and repeal of laws

23. (1) For purposes of this section— 45
- (a) **“affected area”** means any area in the national territory in which the provisions of the Black Administration Act, dealing with the judicial role and functions of traditional leaders, did not apply before the commencement of this Act; and
 - (b) **“affected law”** means any law applicable in an affected area, dealing with the role and functions of traditional leaders in the administration of justice, and includes— 50
 - (i) the Regional Authorities Courts Act, 1982 (Transkei);
 - (ii) the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the Lingwenyama, Amakhosi, Amakhosana and Linduna Act, 1984 (Act No. 8 of 1984); 55
 - (iii) the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 of 1990);

- (iv) the Venda Traditional Leaders Administration Proclamation, 1991 (Proclamation No. 29 of 1991);
- (v) the Bophuthatswana Traditional Courts Act, 1979 (Act No. 29 of 1979);
- (vi) the Transkei Authorities Act, 1965 (Act No. 4 of 1965);
- (vii) the Chiefs Courts Act, 1983 (Act No. 6 of 1983);
- (viii) the Ciskei Administrative Authorities Act, 1984 (Act No. 37 of 1984);
- (ix) the QwaQwa Administration Authorities Act, 1983 (Act No. 6 of 1983).

(2) (a) The provisions of this Act shall, subject to paragraphs (b) and (c), be of no force or effect in any affected area until 31 December 2008.

(b) The affected laws referred to in subsection (1)(b)(iii) to (ix), if they have not been repealed before the commencement of this Act, are deemed to be repealed on 31 December 2008, except where they have been repealed on such earlier date by the competent provincial authorities, whereupon the provisions of this Act shall apply.

(c) The provisions of this Act are applicable in any affected area upon commencement of this Act, if any of the laws referred to in subsection (1)(b)(iii) to (ix) and applicable in such affected areas, were repealed prior to the commencement of this Act.

(3) (a) A king, queen or senior traditional leader upon whom jurisdiction was conferred under section 12(1) or 20(1) of the Black Administration Act, to deal with certain civil and criminal disputes prior to its repeal by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, and which jurisdiction, at the commencement of this Act, has not been revoked under section 12(2) or 20(4) of the Black Administration Act, shall be deemed to have been designated by the Minister under section 4 of this Act as a presiding officer of the traditional court in respect of the area over which such traditional leader has jurisdiction, subject to that traditional leader—

- (i) undergoing the prescribed training programme or course, as contemplated in section 21(1)(b) before 30 June 2009; and,
- (ii) taking the prescribed oath or making the prescribed affirmation, as contemplated in section 15(1), within three months after the commencement of this Act, failing which such designation by the Minister under section 4 of this Act is deemed to have been revoked.

(b) A king, queen or senior traditional leader upon whom jurisdiction was conferred under any provision similar or corresponding to section 12(1) or 20(1) of the Black Administration Act, in any affected law in force in any affected area, to deal with certain civil and criminal disputes, and which has not been revoked under any similar or corresponding provision to section 12(2) or 20(4) of the Black Administration Act, in any affected law in any affected area, shall, when the laws contemplated in subsection (1)(b)(iii) to (ix) are repealed as contemplated in subsection (2)(b) or when this Act becomes applicable in an affected area as contemplated in subsection (2)(c), be deemed to have been designated by the Minister under section 4 of this Act as a presiding officer of the traditional court in respect of the area over which such traditional leader has jurisdiction, subject to that traditional leader—

- (i) undergoing the prescribed training programme or course, as contemplated in section 21(1)(b), before 30 June 2009; and
- (ii) taking the prescribed oath or making the prescribed affirmation, as contemplated in section 15(1), within three months after the commencement of this Act, failing which such designation by the Minister under section 4 of this Act is deemed to have been revoked.

(4) (a) Nothing in this Act affects proceedings pending at the commencement of this Act or at the time of the repeal of the laws referred to in subsection (1)(b)(iii) to (ix) as contemplated in subsection (2), and such proceedings, arising out of the application of the provisions of the Black Administration Act, or the laws referred to in subsection (1)(b)(iii) to (ix), dealing with the judicial role and functions of traditional leaders, continue as if this Act had not been passed and, for this purpose the said provisions of the Black Administration Act, notwithstanding their repeal by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, and the laws referred to in subsection (1)(b)(iii) to (ix), continue to be applicable solely for purposes of finalising all pending proceedings.

- (b) Proceedings, for purposes of this subsection, are deemed to be pending if, at the commencement of this Act or at the time of the repeal of the laws referred to in subsection (1)(b)(iii) to (ix)—
- (i) a civil claim has been lodged or a civil summons has been issued but judgment has not been passed or a civil hearing has not commenced; or 5
 - (ii) an accused in criminal proceedings has pleaded but judgment or sentence has not been passed or a criminal hearing has not commenced.
- (5) The following Acts are hereby repealed:
- (a) Regional Authorities Courts Act, 1982 (Transkei); and
 - (b) the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the 10
Lingwenyama, Amakhosi, Amakhosana and Linduna Act, 1984 (Kwa-Ndebele).
- (6) Until such time as regulations are made in terms of section 21, the regulations made under section 12 and 20 of the Black Administration Act, and any regulations made under any law referred to in subsection (1)(b)(iii) to (ix), shall, in so far as they are 15
not inconsistent with this Act or are not otherwise clearly inappropriate, continue to apply and any proceedings commenced under those regulations immediately before the coming into operation of the regulations made in terms of section 21 of this Act, shall continue and be disposed of under those regulations.

Short title and commencement 20

24. This Act is called the Traditional Courts Act, 2008, and comes into operation on 29 June 2008 or on such earlier date fixed by the President by proclamation in the *Gazette*.

Schedule

Offences which may be tried by a traditional court under section 6:

Theft, whether under the common law or a statutory provision, including the theft of stock where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*. 5

Malicious damage to property, where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*.

Assault, where grievous bodily harm has not been inflicted.

Crimen injuria, where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*. 10

MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL COURTS BILL, 2012

1. BACKGROUND

- 1.1 The Traditional Courts Bill, 2012 (the Bill) emanates from the Policy Framework on the Traditional Justice System under the Constitution. The aim of the Bill is to provide for the structure and functioning of traditional courts, in line with constitutional imperatives and values.
- 1.2 The Bill was introduced in the National Assembly in 2008 in terms of section 76(1) of the Constitution. The Portfolio Committee on Justice and Constitutional Development (the Portfolio Committee) to which the Bill was referred, held public hearings during which a number of concerns were raised. A decision was subsequently taken to withdraw the Bill from the National Assembly and to introduce it in the National Council of Provinces in terms of section 76(2) of the Constitution, with the intention of addressing the concerns raised in the Portfolio Committee during the deliberations of the Bill in the National Council of Provinces. The Bill was withdrawn from the National Assembly on 2 June 2011.

2. OBJECTS OF BILL

- 2.1 The objects of the Bill, as set out in **clause 2** of the Bill, are, among others, to—
 - (i) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
 - (ii) affirm the role of the institution of traditional leadership in enhancing access to justice;
 - (iii) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and
 - (iv) to provide a framework to enhance the effectiveness, efficiency and integrity of the traditional justice system.
- 2.2 **Clause 3** sets out the principles that should guide the application of the Bill, among others, the following:
 - (a) The need to align the traditional justice system with the Constitution in order for the traditional system to embrace the values enshrined in the Constitution;
 - (b) the need to promote access to justice to all persons;
 - (c) the promotion of restorative justice;
 - (d) the enhancement of the quality of life of traditional communities through mediation;
 - (e) the development of skills and capacity of persons applying the legislation in order to ensure the effective implementation thereof; and
 - (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.
- 2.3 **Clause 4** provides for the designation of senior traditional leaders, kings and queens as presiding officers of traditional courts, the revocation or suspension of their designation and the attendance of a training programme within the timeframes set. It also requires the Director-General of Justice and Constitutional Development to keep a register of traditional leaders who have been designated and whose designation has been suspended or withdrawn.
- 2.4 **Clause 5** deals with the civil jurisdiction of traditional courts and sets out the matters in respect of which traditional courts do not have jurisdiction.
- 2.5 **Clause 6** deals with criminal jurisdiction of traditional courts and refers to a Schedule containing offences in respect of which traditional courts have jurisdiction.

- 2.6 **Clause 7** deals with the nature of traditional courts and makes it clear that they are distinct from courts referred to in section 166 of the Constitution.
- 2.7 **Clause 8** provides for the sessions of traditional courts.
- 2.8 **Clause 9** provides for the procedure at the proceedings of traditional courts, which must be in accordance with customary law and custom, except if the Minister prescribes otherwise in regulations. It also requires presiding officers to give effect to the Bill of Rights and the rules of natural justice during proceedings. Legal representation in traditional courts is prohibited, but parties can be represented by any person of their choice in terms of customary law and custom. This clause also makes provision for the situation where two or more different systems of customary law may be applicable in a dispute before a traditional court. Lastly, it regulates how the payment of any fines imposed by a traditional court must be dealt with.
- 2.9 **Clause 10** sets out —
- (a) specific sanctions that cannot be imposed by a traditional court; and
 - (b) a whole range of orders that a traditional court can make, many of which are of a restorative justice nature.
- 2.10 **Clause 11** deals with the enforcement of the sanctions or orders made by traditional courts.
- 2.11 **Clause 12** provides that orders of traditional courts are final, except where an appeal is lodged or where a matter is taken on review. **Clause 13** sets out the powers of a magistrate’s court when it deals with an appeal from a traditional court in respect of certain orders made by a traditional court. The grounds for review are contained in **clause 14**.
- 2.12 **Clause 15** obliges senior traditional leaders and kings and queens who have been designated as presiding officers to take a prescribed oath of office or make a prescribed affirmation before a magistrate before they may preside in a traditional court. It also requires the Director-General: Justice and Constitutional Development to keep a register of every traditional leader who has taken the oath of office or made an affirmation.
- 2.13 **Clauses 16** establishes a mechanism to lodge, receive and deal with complaints against presiding officers. The grounds for lodging a complaint are the following:
- (a) Incapacity, giving rise to a presiding officer’s inability to perform his or her functions as a presiding officer, gross incompetence or misconduct which has a bearing on the administration of justice;
 - (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, 2003, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, 2003, which has a bearing on the administration of justice;
 - (c) any other wilful or grossly negligent conduct which is incompatible with or unbecoming of, the office of presiding officer; or
 - (d) any contravention of a provision of this Bill.
- 2.14 **Clause 17** empowers the Minister to assign officers who will assist traditional courts in performing their functions under the Bill.
- 2.15 **Clause 18** sets out what records are to be kept by traditional courts.
- 2.16 **Clause 19** creates a mechanism which regulates the transfer of cases in certain circumstances from a traditional court to a magistrate’s court or small claims court and from a magistrate’s court or small claims court to a traditional court.

- 2.17 **Clause 20** creates offences and penalties.
- 2.18 **Clause 21** empowers the Minister to make regulations in respect of a number of matters, among others, the training programmes which traditional leaders must attend, the designation of traditional leaders as presiding officers, registers to be kept by the Director-General, the lodging of appeals and procedural reviews, powers of magistrates in respect of procedural reviews, the oath or affirmation of office to be taken or made by presiding officers of traditional courts, the manner of dealing with fines, the keeping of records, the referral of matters from a magistrate's court to a traditional court and vice versa, the lodging of complaints against a presiding officer and the manner of execution of judgements of a traditional court in a magistrate's court.
- 2.19 **Clause 22** provides for the delegation of the powers of the Minister under the Bill to senior officials in the Department of Justice and Constitutional Development.
- 2.20 **Clause 23** contains a range of different transitional arrangements in order to ensure a smooth implementation of the proposed legislation.
- 2.21 **Clause 24** contains the short title and commencement of the Bill.

3. FINANCIAL IMPLICATIONS FOR THE STATE

Financial implications will result from the implementation of training programmes for presiding officers of traditional courts. The funds for this purpose will be accommodated within the Department's allocated budget.

4. PERSONS AND INSTITUTIONS CONSULTED ON THE BILL

- 4.1 The Department of Justice and Constitutional Development consulted with the structures of traditional leaders and the South African Local Government Association. Consultation with the structures of traditional leadership took place at national and provincial level. At national level a Conference of Magistrates to which members of the National House of Traditional Leaders were invited, took place during September 2007. The Conference discussed the policy initiatives that should be considered in drafting the Traditional Courts Bill. Flowing from the Conference, the Policy Framework and the Bill supporting the policy were drafted in consultation with the Constitutional Affairs Committee of the National House of Traditional Leaders.
- 4.2 Further provincial consultative workshops were held with provincial Houses of Traditional Leaders and SALGA, at which the South African Human Rights Commission, the Commission on Gender Equality, magistrates and prosecutors participated.
- 4.3 During the consultation process the policy thrust enunciated in the Policy Framework and Traditional Courts Bill was largely supported by the structures within the institution of traditional leadership, SALGA and members of the lower court judiciary.

5. PARLIAMENTARY PROCEDURE

- 5.1 At the time of the introduction of the Bill in the National Assembly, the State Law Advisers and the Department of Justice and Constitutional Development indicated that the Bill must be dealt with in accordance with the procedure established by subsection (1) or subsection (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution (indigenous and customary law).
- 5.2 At the time of the introduction of the Bill in the National Assembly, the State Law Advisers indicated that the Bill must be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership

and Governance Framework Act, 2003 (Act 41 of 2003), since it contains provisions relating to customary law or customs of traditional communities. This was done.

Printed by Creda Communications

ISBN 978-1-77037-921-3